IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

CRYSTAL COPPER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

PLAINTIFF IN ERROR'S BRIEF

WALKER & WALKER, C. S. WAGNER,
409 Silver Bow Block, Butte, Montana.
Attorneys for Plaintiff in Error

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Upon Writ of Error to the United States District Court of the District of Montana.

STATEMENT OF THE CASE

The defendants in error, and three others, claiming to be a mining co-partnership, brought action against the plaintiff in error for damages for

breach of an alleged mining lease, the specific allegation as to their status is:

> "That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, are, and at all times herein mentioned were, mining co-partners in mine, subleasing from said defendant.' '
> (Tr. p. 5, paragraph 5.)

Trial was had to the court sitting with a jury, resulting in a verdict in favor of the defendants in error, Tamietti and Gaido, in the sum of seven hundred seventy and 66/100 ($770.66) dollars each (Tr. 40), upon which judgment was duly given and made (Tr. 41), to reverse which this writ of error is prosecuted.

To obviate confusion, we will, in this statement, designate and refer to the parties as they were treated, and as they appeared in the trial court.

The amended complaint (Tr. 2.) discloses that defendant, Crystal Copper Company, is a corporation organized under the laws of the state of Maine, engaged in mining ores in quartz mine known as the "Goldsmith Mine,' located in Silver Bow County, Montana, and which mine extends in an easterly and westerly direction of about fifteen hundred feet, and in a northerly and southerly direction of about six huundred feet; that there was a level therein designated as the five hundred foot level, and a shaft commonly known as "Shaft No. 1,"

which was the only shaft used to hoist and lower men working in the mine, and to lower timber, hoist ore and lower other supplies used in connection with the operation of the mine, and said shaft was in the possession of and under the charge and control of the defendant; that there was a lead at and below the five hundred foot level running in an easterly and westerly direction, known as the "North Lead," in which, in a northwesterly direction from the shaft referred to, there was a winze about thirty-five feet deep from and under said five hundred foot level; that defendant had full power and authority, as lessee, of said mine, to sub-lease and to grant to miners any of the ores in any part or portion of the mine, with the right in the miners to the exclusive possession and exclusive right to work said parts or portion of the mine as they were granted by the defendant (Tr. 4, Par. 3); that one Matt W. Alderson was the agent and manager of the defendant with full power, authority, charge, control, superintendency and management of the mine for the company, and with full power and authority from the company to sub-lease and grant to miners all the ores in any part or portion of the mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of the mine as were granted by the defendant (Tr. p. 4, par. 4).

That about the 26th day of June, 1921, the five plaintiffs named in the complaint entered into an oral lease with the defendant for a certain portion of said mine, to wit: Fifty feet downward in said north lead from and under the five hundred foot level of the mine, approximately one thousand feet in a northwesterly direction from said shaft and easterly along the lead to the east from under the five hundred foot level, approximately one hundred feet in a northwesterly direction from the shaft and easterly along said lead to the east boundary line of the mine, and westerly to the west boundary line of the mine, the terms being that plaintiffs were to enter into and upon the property and commence work and continue to work in the winze and sink it to a depth of about fifty feet and search for marketable ores.

That in consideration of the work to be performed by plaintiffs the defendant granted to plainaiffs the exclusive right of possession of the winze, and any drifts, cross-cuts and stopes from it which plaintiffs would make in that portion of the mine, and granted the plaintiffs all the commercial ores they would discover in the winze to the depth of fifty feet, and all commercial ores discovered in any and all drifts, cross-cuts and stopes from the winze to the depth of fifty feet within the boundary lines of the mine, and up to the five hundred foot level of the mine, with the exclusive right to

mine and remove any and all ores discovered by the plaintiffs from the winze, and any drifts, cross-cuts and stopes the plaintiffs would make in the above described portion of the mine, and the defendant was to furnish all explosives, all tools and timber needed without charge to the plaintiffs, and to hoist and lower plaintiffs and their servants whenever necessary; to hoist waste and ore which plaintiffs delivered to the shaft on the five hundred foot level in the mine in full carloads from the winze, drifts, cross-cuts and stopes without charge to plaintiff, outside of certain royalties to be paid the defendant as consideration for the allotted lease (Tr. 5, par. 7).

It is then alleged that four of the plaintiffs entered the mine about the 26th day of June, 1921, and commenced work under the alleged contract (Tr. 7, par. 8). Paragraph nine sets forth that after the plaintiffs had discovered a commercial vein of ore, about July 20, 1921, the defendant orally agreed with them to grant, and did grant, an extension of territory to the plaintiffs to be mined by them in consideration that they sink the winze to a deeper depth, and they would then have the exclusive right to all ores they discovered between the bottom of the winze when sunk to a deeper depth up to the five hundred foot level, and within the boundary lines of the mine upon the same terms, conditions and royalties as contained

in the original lease. When this extension was made the other alleged partner, having been ill, joined the alleged partnership, and commenced working the lease with them (par. 7, par. 10).

The eleventh paragraph (Tr. 8) alleges that the plaintiffs, about July 20th, 1920, commenced sinking the said winze to a deeper depth than fifty feet until they had reached a depth of about seventy-five feet, when they struck a fault, whereby they sank a sump into the winze, and then drifted east and west from the winze on the vein for a distance of about one hundred feet east, until they came to a point where the vein ceased to be of commercial value, that they then returned to the winze and commenced breaking and stoping ore and stoped up to twenty feet east from the winze, when they were again granted an extension by the defendant for additional territory with the exclusive right to mine all ores they would discover by crossing from the north into the footwall of the lead between the boundary lines of the mine and the bottom of the winze and level of the mine, and would get exclusive possession upon the same terms, conditions and royalties as contained in the original agreement. That plaintiffs then commenced cross-cutting from the bottom of the drift into the footwall of the lead, and cross-cutted about fifteen feet into another vein in the same lead, and struck rich and valuable ore, naming the assays and the size of the vein (Tr. 8, par. 11).

It is then alleged (Tr. 9, par. 12) that in accordance with their agreement they shipped ten cars of ore between the 10th day of August, 1921, and the 31st day of March, 1922; that plaintiffs and defendants had made full settlement of the first eight cars of ore shipped, and that the defendant thereby ratified the terms and conditions of the contract; that on the 31st day of January, 1922, the defendant received smelter returns in settlement of the ninth car that was shipped; that on or about the 3rd day of March, 1922, defendant received smelter returns and settlement on the tenth car that was shipped; that certain sums were withheld by the defendant from the plaintiffs for the payment of stock of the defendant company theretofore purchased from the defendant, which defendant neglected and refused to deliver to plaintiffs, and claimed that there was a balance of $22.86 due, owing and unpaid the plaintiffs by the defendant upon the ninth and tenth cars of ore shipped by plaintiffs to the smelter under said lease.

The thirteenth paragraph alleges in substance that four of the partners worked continuously under their contract and its extensions from the 26th day of June, 1921, until the 16th day of January, 1922, and that the fifth partner worked continuously from the 20th day of July, 1921, to the 16th

day of January, 1922, on which date the defendant arbitrarily ejected the plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, without cause, and arbitrarily refused to permit them to go on under the contract, without cause, or to enter in or upon the property, and arbitrarily cancelled and rescinded the contract without cause. That plaintiffs were at all times able, ready and willing to go on with the work had they been permitted to do so by defendant (Tr. 10, par. 13).

It is then alleged (Tr. 11, par. 14):

> "That there were about 1000 tons of ore averaging 70 ounces of silver per ton and $11.00 in gold per ton, or of the value of $81.00 per ton, in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within 30 days from and after the said sixteenth day of January, 1922, if the said defendant had not interferred with the said plaintiffs and lessees, and arbitrarily cancelled and rescinded the said sub-lease, without cause, that the said plaintiffs and lessees were and are entitled to under said sub-lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, and that these plaintiffs would have realized on said ore a net profit to themselves of sixteen and 67/100 ($16.67) dollars per ton; and that there were approximately one thousand (1000) tons of ore to be mined in the foot wall of said lead

between the bottom of said winze and the 500 foot level of said mine, and the east and west lines of said mine, which could and would have been mined by said plaintiffs and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interferred with said lessees and arbitrarily cancelled and rescinded the said sub-lease, without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sub-lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton, or of the value of $42.00 per ton for said ore, which said lessees could have mined at a net profit of twelve and 50/100 ($12.50) dollars per ton to said plaintiffs under the terms and conditions of said sub-lease.

15.

That by reason of the said arbitrary cancellation and rescission of said sub-lease, without cause, and the arbitrary ejectment of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property by the defendant, without cause, as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sub-lease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of twenty-two thousand one hundred sixty-six and 67/100 ($22,166.67) dollars, no part of (10) which has been paid; that the cancellation of said sub-lease and the ejectment of said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property and the refusal as aforesaid of said

> defendant to permit plaintiffs to go on with the said sub-lease was arbitrary on the part of the defendant, and without cause."

The prayer is for damages in the sum of $22,166.67.

There was a second alleged cause of action stated in complaint (Trans 13 et seq.) which is not before the court on this writ of error for the reason that at close of the trial a directed verdict on defendant's motion was granted the defendant thereon (Trans. 185).

By its answer the defendant admitted its corporate capacity, that it was operating the Goldsmith Mine; that Matt W. Alderson was its manager and superintendent.

As to the alleged contract the defendant plead affirmatively:

> "That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519. Section 7593 and Section 7939 of the Revised Codes of Montana of 1921."
>
> (Trans. 28, Paragraph 7).

The defendant admitted that at the time set forth in the complaint the plaintiffs or some of them performed some work in the mine and extraced ores therefrom. (Trans. 29, Par. 11); also that some ores were shipped from the mine which had been mined by plaintiffs or some of them, and that plaintiffs were fully paid for all work, labor and services performed by them, or any of them (Trans. 29 Par. 12).

All remaining issues of plaintiff's complaint were placed in issue by general and specific denials (Trans. 28-29).

Defendant's affirmative allegations were placed in issue by reply (Trans. 34).

Upon the issues as thus framed, the cause came on regularly for trial on the 3rd day of December, 1924 (Trans. 36).

At the outset, plaintiff objected to the introduction of testimony because the complaint does not state facts sufficient to constitute a cause of action (Trans. 48).

Batt Tamietti was the first witness sworn. Upon it being made apparent that Matt W. Alderson, plaintiff's manager, was dead, objection to the witness testifying as to transactions with a deceased agent of a corporation was made and overruled by the court (Tr. 50). Before the witness was permitted to testify as to the alleged contract further objections were made as follows:

> "At this time, may it please the court, we object on the ground and for the reason that the complaint in this case shows upon its face that the plaintiffs seek recovery upon an alleged oral lease entered into between themselves and the defendant corporation, through the instrumentality of an agent or general manager of the corporation, that therefore the complaint discloses that while the alleged contract is denominated as a lease, it is in law and under the allegations of the complaint a parol license to enter into and upon the Gold-

smith mine, for the purpose of working the same, and being a license rather than a lease the complaint fails to state facts sufficient to warrant a recovery, in that recovery is sought upon the basis of a prospective privilege or profits to be earned in the future, whereas, under the license they are limited to recovery, if recovery may be had at all, for ores actually removed from the place and mined. In other words, their recovery is limited to a share of the proceeds of personal property after removed from the mine. Further, we object to the testimony because the plaintiffs in this action seek a recovery upon the proposition that they are a mining partnership, having sued as a mining partnership, and under the laws of the state of Montana, their holding being that of licensees, there is no allegation in the complaint that they own the Goldsmith mine or acquired an interest in the Goldsmith mine itself, such as is required to constitute a mining partnership, and having undertaken to recover as a mining co-partnership, they may not recover in this action as individuals upon any theory. Further, we (45) object to any further testimony in this case, upon the ground that the complaint shows upon its face that the alleged contract was an oral contract, and is therefore void under the statute of frauds, particularly sections 7593, 7599, subdisivion 5, section 7939, all of the Civil Code, and sections 10611 and 10613 of the Code of Civil Procedure, all being sections of the Revised Codes of Montana of 1921. And we object, further, that the complaint shows upon its face that the alleged contract sued upon, though oral, is so vague, indefinite and uncertain in its terms as to be void and not enforecable, and that it would require the court

to make a contract for the parties in order to recover on any theory of the case.'

The court, after listening to argument upon this motion, reserved the points of law involved (Tr. 53), and permitted the witness to testify as to the terms of the contract, and his testimony as it appears in the record is, for the convenience of the court, here set out:

"On the 26th day of June, 1921, I heard from Mr. Frank Tamietti that Mr. Alderson, the manager of the Crystal Copper Company, that he wanted to lease a portion of the Goldsmith mine in the northwest of the claim, and so as soon as we heard that we decided together and we went and sent Frank Tamietti to see after we were all there in the house, we agreed to go up and see Mr. Alderson about the terms and conditions of this lease. So the condition and the terms of this lease, whatever it was we were doing on our part, was satisfactory; and the terms and condition was to pay so much for royalty, and after we paid the royalty divide from the net profit, divide fifty-fifty, and the condition was to sink fifteen feet more in the winze there, that it was down 35 feet already, and then we had the right to extract all the ores there was there on both sides, east and west, and if we were doing some improvement work from that deep up, north from that deep fifteen feet up to the level; if we were doing some extra work, you know, cross-cutting north and south and find some ore maybe, and have the right to take it all out, too.

MR. WAGNER: Just a minute. In order to save the record and expedite proceedings,

we move the answer be stricken and urge the same grounds urged in the objection to any future testimony the witness may give—we will ask to save the record that way, the same objections may apply, motions to strike and the same ruling.

THE COURT: It is so understood, the objection goes to all this testimony.

Q. When you referred to your partners, who did you refer to? When you spoke of your partners, what people did you speak of? (48)

A. Mr. Alderson and Mr. Lawrence Monzetti, and Mr. Frank Tamietti, and Mr. Pete Gaido, and myself, Batt Tamietti, and John Pagleero.

Q. Was Mr. Alderson one of your partners?

A. No, all the rest were my partners.

Q. What level in the mine was this winze you were going to work in?

A. The 500 foot level, the No. 1 Goldsmith shaft.

Q. How far was that from the shaft?

A. Northwesterly about a thousand feet.

THE WITNESS: The royalties, we were to pay were on ore of a value of twenty-five dollars a ton, $11.50; on ore of the value of from twenty-five to fifty dollars, we have to pay $23.00, and from fifty to a hundred dollars, we have to pay $34.00, and from $100.00 to $200.00 we have to pay $50.00, and from two hundred up, we have to pay 56% royalty. This royalty was to be paid to the Clark bank. We used to pay all the expenses of shipment and treatment before paying the royalty, and then we paid according to the value of the ore, so much per cent, and then divided fifty-fifty on the net, divided fifty-fifty with the Crystal Copper Company. I and my partners were to

have the other half. The ground or territory which we were to have, the lease, was to sink complete fifty feet in this winze, and then we would have the right to take all the ore there was east and west of that winze, and if we did some improvement work on the hanging and foot wall, would have the right to take it out too; have all the ore as far as it went. I spoke of fifty feet, and that was from the level, the 500 foot level. The winze was 35 feet deep before we started. The Crystal Copper (49) Company was to furnish the machinery, tools, supplies, powder, fuse caps, timber, and everything, and we have to do the work. The company was to hoist the ore and the waste, from the level, the 500 foot level, but we were to run it out to the shaft. When we started to work there there was about 10 or 12 feet of water in the winze, and we had water all the time we sank.

Q. And did you accept the terms of the lease?

MR. WAGNER: We object to that as being leading and suggestive and calling for the conclusion of the witness.

THE COURT: The objection is overruled.

MR. WAGNER: Exception.

A. Yes, sir, we accepted it in that way.

We started to work on the night of the 26th of June, at 10 o'clock, started sinking in the winze; started to rustle a pump and connect this pump and then started to work pumping the water, and after we had the water out we started to clean out lots of dirt that was around the winze in the bottom, and then of course started to blast, and timber and do anything we needed. It was only waste at that time. We sank down to the depth of about 45 feet before we had ore, and discovered ore about

that point, in the far corner of the east winze. We continued to sink until we had about fifty-one, fifty-one and a half or fifty-two feet and then the ore was going down and we had to sink more, and Mr. Alderson, he used to generaly come down every day in the mine, and we were working there together, the five, except when we used to hoist all ore and the waste; we had a little ore, to hoist on the level—we were not four there working; one hoisting the ore and the waste, and we asked permission of Mr. Alderson if we cannot sink more on this lead, and Mr. Alderson say "Sure," he said, "down in this winze," he (50) said, "until the ore is gone; the more you sink the more ore you are going to have up over your head; and you fellows going to make money and the company going to make money." So we keep on going and sinking until we were about 75 feet deep, and something come across from the west side, they call it a fault, and it cut all the ore out, so we agreed, our partners together, no more use to sink in here, there's no more ore and better notify Mr. Alderson that we intended to quit. All right. As soon as we went on top at noon-time we saw Mr. Alderson and notified him about it. Well, he would be down tomorrow, he said, and so all right. He come down the next day and he said, "All right, just sink in a sump enough to hold the water between one shift and another, and then," he say, "you can take out all the ore as quick as you can." So we start right away to sink a little bit of sump and then we went east and west extracting ore, the way the lead go, you see.

Four of us started to work in this winze on the night of the 26th, Mr. Lawrence Monzetti, Mr. Pete Gaido, and Mr. John Pagleero, but

our lease, when we went up to take this lease, was to be with five partners, but at that time Mr. Frank Tamietti was sick, but we were to take him in when he was able to work and accept him as a partner. He came to work there some time in July, the 15th or 20th, 1921, after we had struck the ore.

The terms of the extension were the same conditions as when we started to work there, exactly the same condition as to royalty and everything else, we were to follow the ore as far as it went (Tr. 54-58).

Peter Gaido's testimony concerning the alleged contract also went in over objection, and his version of the transaction, as contained in the record, is as follows:

"On the 500 foot level we know of a place that was to be leased, and Batt Taimetti and John Pagleero and Frank Tamietti and myself, we know the conditions and we would agree to go down and sink this winze on the 500 foot level, which was about one thousand feet northwest of the main shaft, and we were to sink that winze and go east and west as far as the ore would go. The agreement was to sink the winze to complete fifty feet. The royalties were to be so much per cent of the ore. The Crystal Copper Company was to furnish the tools and supplies, powder and timber and air, and to hoist (114) the ore and waste. We commenced working on that lease the 26th of June, 1921, and those going to work there were me and Mr. Frank Tamietti and Lawrence Monzetti. We went up and the first work we did was to establish the pump and to connect the pipe. The winze had 14 or 15 feet of water and we started to pump the water and when

we got that out there was a few carloads to pump out, and then we got timbers and fixed the winze and sank. Sank it 75 feet, complete with a sump. We put it about 50 feet down on the hanging wall lead, and we supposed it was good ore, and had Mr. Alderson, the general manager of the Crystal Copper Company, come down and look at it, and he said it was looking fine, and then our partners asked for permission to sink some more, and Mr. Alderson said, "Boys, sure, go ahead and sink the winze as far as the ore goes, and the more you sink the more we are going to have ore up above." We were to have extension of the lease on the same terms and conditions, and with the same royalties. The same way with the ore extending west and east and north and south. We followed the ore down the winze 70 feet, and it happened that a fault was coming in from the west end, and cut all the ore out in the bottom of the winze. As soon as we struck this fault we went in the office to Mr. Alderson, and told him we struck the fault, and he came down the next day and looked, and there was five partners at that time working, Batt Tamietti and Frank Tamietti, and Lawrence Monzetti and John Pagleero and myself, and he said it didn't pay to sink any more; Mr. Alderson say, "No, boys, you might as well not. We need some ore, go ahead and go east and west (115) and get all the ore you can as quick as you can" (Tr. 120-121).

Monzetti testified over objections concerning the terms of the lease as follows:

"The terms of the lease was to go down and sink the winze on the 500 foot level of the Goldsmith mine, northwest of the shaft about 1,000 feet.

The winze already extended down 35 feet south, and under the terms of the lease the work that was to be done was to go down 15 feet more. We found some ore after we got down about 48 feet. We were to have any ore we discovered in the distance between 35 and 50 feet. Under the lease we were to get all the ore we could find, as far up as the 500 foot level, and as far east as the ore would go within the mining claim, and as far west as the claim would go. The royalties we were to pay on twenty-five to thirty dollar rock was $11.30, and from thirty to fifty, $23.00 royalty, and from fifty to a hundred was $34.50, I think, and from one hundred to one hundred and fifty was $46.00, and from one hundred and fifty to two hundred was $56.00. The Crystal Copper Company was to furnish the equipment and the hoisting of rock and ore. We used to pump the water. The Crystal Copper Company furnished the pump. The (101) company furnished the air for the drills. The company furnished the pump, and we used to do the work. We started on that lease on the 26th day of June, 1921. The first day we went there we went down and put in the pump and connected the pipe on it, and pumped the water. The men who went down to work were myself and Mr. Pagleero and Pete Gaido. The first work we did was pumping the water. After we had the water pumped out we started to sink and clean up; started to pump because the water was standing there for quite a while and the ground was kind of loose and soft. We dug that winze as far as 75 feet. When we dug to the depth of 500 feet we were not supposed to go any further, and we notified Mr. Alderson to see if we couldn't sink any more, and he said to go ahead, and follow the

> ore, he said, as far as it goes, as far as went to, as far as the ore goes. We found ore above that, found the ore about 48 feet deep, that is from the top of the winze down 48 feet we found ore. Mr. Alderson said to extend the ore down as far as went on the ore. The ore went down as far as 75 feet. The conditions of the extension of the lease when we had the 500 foot down, as far as we could go, was the same as before, the same terms and conditions, that is, we were to have the ore from the depth where we reached up to the 500 foot level, up to the east end of the claim and to the west end of it, if it should go there. After we got to the depth of 75 feet we struck a fault; we then notified Mr. Alderson that it wouldn't pay to sink any more, and he said to sink a sump enough to hold the water before the two shifts; and then we started drifting on the ore" (Tr. 107-108).

The foregoing constitutes the evidence in the record concerning the alleged contract.

It is apparent that all of the alleged partners did not voluntarily join as plaintiffs to the action. Batt Tamietti himself testified:

> "There were five of us in this partnership, Mr. Pete Gaido, Frank Tamietti, Lawrence Monzetti, John Pagleero, and myself. Frank Tamietti is here in court at present, as is also Pete Gaido. Frank Tamietti is my brother. My brother, Frank Tamietti, did not join me in this suit as plaintiff" (Tr. 98).

Frank Tamietti, one of the parties, testified concerning his connection with the case, as follows:

"My name is Frank Tamietti; I reside in Walkerville, Montana, and am a brother of Batt Tamietti, one of the plaintiffs. I am named as one of the plaintiffs in this action but have got nothing to do with the case. I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th" (Tr. 156).

John Pagleero, also one of the parties, testified:

"After the arrangement between myself, Frank Tamietti, Bat Tamietti, Pete Gaido and Lawrence Monzetti was terminated on the 16th of January, 1922, I received a settlement in full for my stock and my money from the Crystal Copper Company. I have no interest in this case now" (Tr. 175).

Monzetti testified:

"On the 16th of January, Mr. Alderson told me that the lease was cancelled. I had moneys coming at that time as a result of ores I had shipped to the smelter, and received the moneys that was due me for ores I had shipped. At the time the lease was cancelled and right afterwards, I was paid for everything I had taken out and shipped, for everything I had mined and shipped" (Tr. 114).

That he received from the defendant a check dated March 4, 1922, in the sum of one hundred ($100.00) dollars (defendant's exhibit J, Tr. 31), and on the same day a check for one hundred ($100.00) dollars in settlement of his stock deal

with the defendant (defendant's exhibit K, Tr. 131), and on the same day a check in the sum of eleven and 43/100 ($11.43) dollars for services rendered to March 4th, 1922 (exhibit L, Tr. 132); another check in the sum of eighty and 85/100 ($80.85) dollars for services rendered to January 31, 1922 (defendant's exhibit M, Tr. 132), on the same day he signed defendant's exhibit N, as follows:

"DEFENDANT'S EXHIBIT "N."

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of eleven and 43/100 dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-partner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOZETTI.

Witness:

MATT W. ALDERSON."

(Tr. 133.)

These exhibits all went in over objection of his counsel, the witness claiming that at the time he received these checks and signed the release that he had been working in a mine and was just com-

ing off shift, and had been working in a gassy place and was sick at the time with gas, but nevertheless he cashed the checks and kept the money (Tr. 176-180, inc).

Prior to his decease and at a former trial of this action, Matt W. Alderson, defendant's agent, testified that there was due, owing and unpaid to Batt Tamietti the sum of eleven and 43/100 ($11.43) dollars, and eleven and 42/100 ($11.42) dollars to Pete Gaido (Tr. 139); Batt Tamietti testified that this amount due him had been tendered him, and that he knew that his other partners, Frank Tamietti, John Pagleero and Lawrence Monzetti, took their shares, his testimony in this regard being:

> "I worked there from the 26th of June, went to work, I and my partners, on the 26th of June, 1921, on night shift, and worked up until the evening of January 16, 1922, a period of seven months and sixteen days. In that time we took out ten carloads of ore, nine carloads containing fifty tons and one about 45 tons. For the ore that I took out in those shipments I did not receive my full portion of the net profits, all but about eleven dollars and forty-three cents, and those two hundred shares. I refused to take $11.28 that Mr. Alderson tendered, because he wanted to make me sign a paper that I didn't have to sign, and I refused to take the money. I know that my other co-partners, Frank Tamietti, John Pagleero and Lawrence Monzetti took their share. They also took their share of the stock" (Tr. 99).
>
> "This $11.28 that Mr. Walker spoke about

> was handed to me by Mr. Alderson, and he offered to give it to me with a piece of paper that he wanted me to sign, and said, 'Before I give you this check I want you to sign this.' I said that I couldn't read it. He said, 'You can read it, and after you read it I want you to sign this.' I said, 'I won't sign this, I got this in the hands of my attorney, and I have to see if it is all right.'" (Tr. 100.)

The amounts due Gaido and Batt Tamietti, as above indicated, amounting to twenty-two and 85/100 ($22.85) dollars, with accrued interest, were deposited in court for the use and benefit of said parties (Tr. 145-146).

The foregoing embraces all of the testimony in the record pertinent to the issues involved touching the alleged contract, and the dealings of the parties inter sese.

Upon the question of damages for loss alleged to have been sustained by reason of the breach of the alleged contract, based upon prospective profits, opinion testimony was introduced. The witness Batt Tamietti gave his opinion that there was something like about one thousand tons of ore left in the ground which they were deprived of mining (Tr. 98). The witness Pennington qualified as a surveyor and civil engineer. He prepared a plat of the ground in controversy, from data furnished him, but never saw the ground, and his testimony was purely speculative, and not from actual observance of the mine itself (Tr. 102-103). He

gave it as his opinion that there were about twelve hundred seventy-five tons of ore remaining to be mined (Tr. 105). Richards testified concerning conditions as he believed them to be, he having at one time worked in the mine (Tr. 117-118). Gaido also gave testimony concerning the territory in dispute (Tr. 119, et seq.). However, this testimony was all eliminated from consideration, for the reason that Frank Tamietti, one of the plaintiffs testified:

> "After January 16th, 1922, when Lawrence Monzetti, Pete Gaido and Batt Tamietti were stopped working there I and John Pagleero continued in the same ground, and took out all the ore that was left in that ground where we had a lease, three cars; there were three cars in that territory.
>
> You can tell by the date of the smelter returns which of these three cars was the shipment of ore we took out on this particular ground. We never did take out any ore of any value on the east side of the fault, and the highest value we took out was on the old stope or what you call the old lease. On that ground my brother, Lawrence Monzetti, Pete Gaido, John Pagleero and I had prior to the 16th day of January, 1922, all the ground that we had under that contract or lease or agreement, whatever it was, there was only three cars left. John Pagleero and I, after January 16th, 1922, did development work or prospective work along the foot wall in the particular ground that Batt Tamietti, my brother, John Pagleero, Pete Gaido, Lawrence Monzetti and I had prior to the 16th of January, 1922; we prospected the foot wall in that particular ground. On

the first forty-five feet from the winze Mr. Alderson came down and said for us boys to start and open up the foot wall ore (168) that it was showing up on the level, for which we sunk our winze, and they were with us until the 15th or 16th, I don't know what you call it, the last day in January; and we went and tapped the lead and when we tapped the lead we found a little streak there that we did sample, and what we took out I know we didn't take out more than about a mine car, and after that they got through it, and, of course, after a while I will tell you why. They got through after and we keep going to work, and we want to go and raise. We went a little east, not very much from these raise or cross-cut or what you call it, about a set, and we went up a hole there but didn't have any value. Well, Mr. Alderson comes down and he says, 'I am not satisfied with all of this,' he says, 'we got to make it sure,' he says, 'if we will leave any more ore on the foot wall.' He says, 'You boys,' he says, 'you got to start another cross-cut a little over east and develop this place and find out if there is any more ore left here.' We decided to come over to the end of our drift where the fault cut off the both lead, and we went in a few feet, but they were not with us any more, and we drive this cross-cut in about forty feet; the lead was running more close over to the hanging wall lead, we didn't have to go so far, and after that we drive from east, we drive, drift to west, and meet the other cross-cut where we tapped a lead of ore; the ore no good; didn't sample more than three or four ounces or six the most; we raised until we went to the level and the ore was no good there; didn't have no value in it, that is what I mean.

We did not ship any ore from the footwall; never shipped a car except what I told you in the cross-cut where we took out about a mine car, and that is all that was there. All the ore that was left in the ground that plaintiffs have been talking (169) about in the hanging wall, we only shipped three cars. All the ore that was left in that ground that I and John Pagleero and Batt Tamietti and Lawrence Monzetti and Pete Gaido had this working agreement on which was terminated on the 16th of January, was three cars, in that block of ground. After we took the three carloads out there wasn't a pound of ore left there.

I did not consult with Mr. Tyvand or McCracken about being a party to this suit. I did not confer or consult with Messrs. Tyvand and McCracken or with the plaintiffs Lawrence Monzetti, Pete Gaido or Batt Tamietti, about this case. They came to me and wanted me to sign and go with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I have got nothing to say against it. I said, 'If you want to fight it go ahead and do it yourself.' We got fifty feet more ground than we asked for. I received all the stock and settled for all the stock I agreed to take" (Tr. 169-172).

Pagleero also testified:

"I was originally from the 26th day of June, 1921, up until the 16th day of January, 1922, engaged in working in the Goldsmith mine with Lawrence Monzetti, Pete Gaido, Batt Tamietti and Frank Tamietti, and am familiar with the ground in which we were operating; know the winze, the stopes and everything.

After the lease, or agreement or contract, whatever it was, was terminated on the 16th of January, 1922, I and Frank Tamietti continued working there in the same ground. After they got through, I think it was three cars of ore that we took out on this side of the fault and four on the other; but am not sure, didn't keep track of that. I think it was three railroad cars that we took out of the particular ground they were working in. We took all the ore we could find that was left there after they had all gone—that we could find in the hanging wall. There was some low grade, but nothing of value. We did some development work on the foot wall in that ground. We drove a cross-cut on the footwall and then we drove a little drift in the foot wall and drove up a couple of raises and couldn't find anything; there was lots of low grade but no value from the assay. We made no shipment from the foot wall of any ores. I think we had about seven or eight hundred pounds. In the first cross-cut we found a little pocket, not quite a mining car, a few powder boxes full" (Tr. 174-175).

The same witness again postively testified that there were only three cars of ore left in the ground, and these were shipped and the returns thereof are found in plaintiff's exhibit Q (Tr. 157-163). So much of these returns as we deem pertinent to this statement follows:

"Net from smelter	$1975.91	
Leasers—one-half	$ 988.00	
Hospital dues, 6 persons, Feb.		$ 6.00
Industrial Accident, Jan. 16 to Feb. 28, 6 persons		23.00

Check 7694—Harry Daniels..... 75.50
Check 7755—Anton Carlevato—30 days —$1.00 ..... 141.50
Check 7756—Sanz—23 days—$1.00..... 108.25

$354.65

Chack 7757—E. H. Walker, Secy.....$ 50.00
Check 7758—Pete Vidack..... 16.65
Check 7759—Ralph Paasch 16.65
Check 7760—John Veal..... 16.70
31½ ds. Check 7761—John Pagleero $166.95—$25 stock sb..... 141.95
32 ds. Check 7762—Frank Tamietti, —$25 stock sub..... 144.60
29 ds. Check 7763—Coston Ponsetti, $153.70—$25 Vidack contract..... 128.70
27 ds. Check 7764—Wm. Bullock, $143.10 —$25 Vidack contract..... 118.10

$988.00

"Net returns from smelter.....$3972.10
Leasers—one-half 1986.05

Check 7845—John Waldie, loading car 2845, Feb. 15.....$ 6.50
Check 7846 Matt Sutter, loading car 2845, Feb. 15..... 6.50
Check 7896—Barry Murphy, loading car 1677 ..... 15.50
Check 7894—Antonio Carlevato, 24 d. @ 4.75..... 114.00
Check 7895—Joe Sanz, 17 d. @ 4.75..... 80.75
Check 7897—E. H. Walker, Secy. stock.. 50.00
Check 7898—Pete Vidack..... 16.70
Check 7899—Ralph Paasch..... 16.65
Check 7900—John Veal..... 16.65
Check 7901—John Pagleero..... 424.45
Check 7902—Wm. Bullock..... 414.45

Check 7903—Caston Ponsetti		404.45	
Check 7904—Frank Tamietti		419.45	
		$1986.05"	
"Net return		$2,013.47	
Leasers' one-half		1,006.74	
Mar. 31. Hospital dues, 6 persons—	$21.60		
" " Industrial Accident 6 persons—$15.60	$ 21.60		
Apr. 12. Barry Murphy, loading car		5.83	7982
W. R. Richards, loading car		5.83	7983
Antonio Carlevato, 21 days, less $1.00		98.75	7984
Joe Sanz, 19 days—$1.00		89.25	7985
Wm. Bullock, 18 shifts, 196.37, plus 3.75		200.12	7986
Costan Ponsetti, 17 shifts, equals $196.37, less $5, plus $3.75		195.12	7987
John Pagleero—16 shifts equals $196.37, less $25, $3.75		165.12	7988
Frank Tamietti, 18 shifts, equals 196.37, less $25, plus 3.75		175.12	1989
E. H. Walker, Secy., Sub.		50.00	7990
		$1,006.74"	

(Tr. 159-163.)

The share received by the miners on these three cars shipped after the contract was terminated on January 16, 1922, amounts to two thousand

nine hundred eighty and 74/100 ($2,980.74) dollars, but it is obvious that all of this did not go to the miners, some deductions being made for loading cars, industrial accident insurance and other work, the figures of which amount to two hundred forty-one and 16/100 ($241.16) dollars, or net to the miners of twenty-seven hundred thirty-nine and 58/100 ($2739.59) dollars.

The record is silent as to the length of time required to mine these three cars; however, it does disclose that the first car was shipped February 25, 1922 (Tr. 158), and that seven miners participated in the distribution of the proceeds of that car; the second car was shipped on March 21, 1922 (Tr. 160), and nine miners participated in the distribution of the proceeds of that car; the third car was shipped on April 11, 1922, and six miners participated in the distribution of the proceeds of that car (Tr. 162).

The plaintiffs Frank Tamietti and John Pagleero helped to mine the ore shipped in these three cars and both participated in the proceeds, as appears on the face of the exhibits.

For the avowed purpose of showing the value of the ore to make an estimate of that remaining in place and to show ratification of the contract upon the part of the company, the plaintiffs were permitted to introduce the smelter returns on all of the ores that had been shipped (Tr. 61-87-148-153).

These statements disclose that Batt Tamietti had received approximately fourteen hundred seventy-two ($1472.00) dollars as his share of the profits on the ten (10) cars, and Gaido fifteen hundred thirty-one ($1531.00) dollars as his share; both parties having worked from the 26th day of June, 1921, until the 16th day of January, 1922.

At the close of the testimony and when both parties had rested, the defendant moved the court for a directed verdict (Tr. 181), and this was granted as to the second count in plaintiff's complaint, and denied as to the first, and the denial of this motion presents one of defendant's specifications of error, and will be found there, as will also instructions refused and other errors relied upon.

Upon the question of damages, the law of the case as contained in the instructions of the court is as follows:

> "If you find from the evidence that the plaintiffs were able, willing and ready to mine certain ores that the defendant is alleged to have leased to plaintiffs, and that the defendant has prevented plaintiffs from mining said ores, the measure of damages to plaintiffs is the value of the ores that the plaintiffs have been prevented from mining, less the cost of mining, shipping and smelting the same, less the royalties from the net smelter returns (189) less the defendant's one-half of the net balance (Tr. 194).
>
> "In this case you are instructed that the plaintiffs seek recovery upon the proposition that they are a mining co-partnership, and in

this connection you are instructed that the plaintiffs Frank Tamietti and John Pagleero have admitted that full settlement has been made to them, and that they have no claim in this litigation against the defendant; and you are further instructed that it is disclosed by the evidence in this case that the plaintiff Lawrence Monzetti was paid in full for all services performed by him under the contract sued upon, and that he signed a release which is in evidence in this case, whereby he admitted full settlement had been received by him for and on account of any interest he may have had in the contract sued upon; hence, the three plaintiffs named are not entitled to recover anything against the defendant, and the sole remaining question for your consideration is whether, under the facts and the law as given to you by the court, the remaining plaintiffs, Pete Gaido and Batt Tamietti, are entitled to recover anything at all against the defendant, as co-partners, each entitled to a one-fifth interest in the profits of the co-partnership, unless in the case of the partner Lawrence Monzetti you believe he was unconscious at the time of signing the release and incapable of realizing the nature and consequence to himself of his act. The evidence in this case submitted by the plaintiffs disclose that three cars and no more of commercial ore was mined and shipped from the hanging wall from the territory claimed by the plaintiffs under their alleged contract, and in this connection the court instructs you that the plaintiffs would be entitled to recover damages, if at all, on the three cars of commercial ore so mined and shipped, only upon the net profits that would accrue to them (191) after deducting all expenses incident to mining the same, and the

burden of proof rests upon the plaintiffs to prove by a preponderance of the evidence that the said ore could and would have been mined by them not at a loss, but at a profit to themselves, and if it could and would have been mined at a profit, then the plaintiffs would be entitled to recover only two-fifths of such profits after deducting the cost of mining as indicated, unless you should find in the instance of Lawrence Monzetti, the condition mentioned at the conclusion of the last instruction as to whether he was conscious or unconscious at the time of signing the release in full.

The court instructs you that in ascertaining whether or not the plaintiffs or any of them were damaged by breach of contract alleged, that no damages may be awarded which are not clearly ascertainable in both their nature and origin, that nothing may be left to speculation and conjecture, and the burden of proof in this case rests upon the plaintiffs to prove by a preponderance of all of the evidence that any ores which they were deprived of mining and would have mined had the contract not been rescinded could and would have been mined at a profit to them, and it is only for such profit that plaintiffs may recover; therefore, if you believe from the evidence that the plaintiffs have failed to establish whether any ores they may have been entitled to mine could have been mined at a profit to themselves or a substantial amount of such profit, then your verdict must be for the defendant.

If you find from a preponderance of the evidence that the agreement or lease was made as alleged, and that th defendant ousted plaintiffs from possession, as alleged, and that plaintiffs (192) had they continued under their

lease, being willing and able so to continue, would have mined the ground at a profit, you are instructed to find for plaintiffs in some amount; in other words, if you so find, plaintiffs would be entitled to at least nominal damages.

As provided by section 8667 of the Montana Codes, for the breach of an obligation arising from contract the measure of damages except as otherwise expressly provided for in this code is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. And again, in section 8668 of the same codes, damages must be certain. No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and their origin. The Supreme Court of this state holds it is elementary that competent evidence must be produced of all facts necessary to a recovery upon which the jury can base a reasonably reliable conclusion; nothing can be left to their conjecture; actual damages only may accrue. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. Actual damages which will sustain a judgment must be established not by conjectures or unwarranted estimates of witnesses, but by facts upon which their existence is logically or likely inferred. Speculations, if any, because of estimates of witnesses are not a proper basis of recovery (Tr. 195-198).

ASSIGNMENT OF ERRORS.

I.

The court erred in denying plaintiff in error's motion for a directed verdict at the close of all of the evidence for a directed verdict at the close of all of the evidence in the case, which said motion is in words and figures as follows:

The defendant now moves the court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining co-partnership, engaged in mine sub-leasing (202) and sub-letting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties, Lawrence Monzetti and the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant, it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining co-partnership between the plaintiffs in their relations with the de-

fendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes, if its establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining co-partnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the partnership, and it affirmatively (203) appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly

for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars woudd accrue to the plaintiffs. There is no evidence before the court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the state of Montana, and the proof in this case discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise,

collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company (Tr. 206).

II.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith mine located in Silver Bow county, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said (205) contract from the profits realized from the ores mined by them ,save and except the sum of $11.43, due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff Batt Tamietti, but these sums with accrued interest have been paid to the clerk of the court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 209.)

III.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case if you find for the plaintiff the court instructs you that you may find for them no more than nominal damages which would include the $28.00 deposited with the clerk of the court in this case for the use and benefit of the plaintiffs Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong but in recognition of technical injury, and by way of declaring a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 210.) (206)

IV.

The court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 211.)

V.

The court erred in refusing to instruct the jury upon matters of law requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

(Tr. 211.)

VI.

The court erred in failing to instruct the jury upon matters of law as contained in the exceptions of the plaintiff in error to the charge of the court, as follows:

"MR. WALKER: If the court please, to the charge to the jury of the court, counsel for the defense on behalf of the defense, asks for a general exception and asks for a general and special exception for the failure of the court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the court erred in (207) failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For further reason the court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty (Tr. 211).

VII.

The verdict and judgment are contrary to law (Tr. 212).

ARGUMENT

ASSIGNMENT OF ERRORS 1, 5, 6 and 7

THE STATUS OF THE PARTIES INTER SESE:

The first and seventh specifications are comprehensive and embrace nearly all of the points we will urge in this argument; so much thereof as relates to the status of the parties inter sese will be first argued.

As pointed out in the statement, the five parties whose names appear as plaintiffs to the amended complaint, from the beginnig insisted that they were and are a mining co-partnership (Tr. 5, Par. 5) which contention was specifically denied by the company in its answer (Tr. 28 Par. 5). So insistent were Pete Gaido and Batt Tamietti in their notions about the partnership that they joined Frank Tamietti against his protest, as one of the parties, and joined John Pagleero when he had no interest in the case. These parties were joined manifestly for the reason that the parties took the postion that being a mining co-partnership all of the members of the partnership were necessray parties to successfully prosecute their action against the Company. It is therefore as mining co-partners that they must recover, if at all; their sole contention being predicated upon the proposition that the alleged breach of contract was the so called partnership, and not with any of the parties as indviduals.

Mining co-partnerships have been recognized since

the beginning of the mining industry in this western country. They exist by operation of law without any express agreement.

Since the enactment of our Codes, in 1895 express statutory authority is conferred for the formation of mining co-partnerships by porole (Sec. 8051 Revised Codes of Montana 1921) but it is essential to the existence of mining co-partnership that certain elements be made to appear affirmatively, the statutory declaration being:

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same."
> Sec. 8050 Revised Codes of Montana, 1921.

This Section and the one adverted to formerly appeared as Sections 3350 and 3351 of the Civil Code of 1895 and our Supreme Court in the case of A. C. M. Co., vs. B. B. M. Co., 17 Montana, 519 held that the requirments of the statute were necessary to the existance of such partnership.

In distinguishing between general and mining partnerships, the court said:

> "A mining partnership, under the statute, is very different from an ordinary partnership. There is usually, practically, in a statutory mining partnership, no delectus personarum (Doughtery v. Creary, 30 Cal. 300), as there is in ordinary partnerships. An ordinary partnership is formed by contract between the

partners. A mining partnership is formed by reason of the existence of certain facts described in the statute. Those facts are:

(1) That two or more persons shall own or acquire a mining claim for the purpose of working it, and extracting the minerals therefrom (section 3350, Civil Code); that is to say, the relation arises from the ownership of the shares or interests in the mine. This is the first fact as a foundation for a mining partnership.

(2) The second fact required to exist is that such owners actually engage in working the mine (A. C. M. Co. v. B. & B. M. Co., 17 Mont. pp. 519-528).

Our statutory provisions relating to mining partnerships were borrowed from California and were enacted in that state in 1872 and are found in the California Civil Code as sections 2511, et seq.

The District Court of Appeals for the First District of California had occasion to construe these sections under facts essentially similar to those of the case at bar, and in the decision adverted to the matter was brought to the attention of the Supreme Court of the state for rehearing, and the petition denied.

The case adverted to is Michalek v. New Almaden Co., 184 Pac., p. 56.

In that case the plaintiff sued as the agent of five individuals who were alleged to have been the members of a mining co-partnership, for the recovery of the reasonable value of work and labor per-

formed by the co-partnership. It appears from the statement of facts that the defendant was the owner of a quicksilver mining property in Santa Clara county, and that the persons composing the alleged co-partnership had been working as miners upon the property, and while so working they discovered some quicksilver metal. An interview was thereupon arranged with the general manager and foreman of the defendant and th spokesman for the alleged partners with the result that an oral agreement was entered into between the manager and miners whereby they agreed that the miners could have the privilege of opening up a tunnel and to take out ore and deliver it to the company for one and one-half years after the completion of the tunnel, for which the company was to pay them at the rate of six dollars per ton for each one per cent of quicksilver in the ore delivered by the co-partnership to the defendant at the mouth of the tunnel. In that case, as in this, the defendant agreed to furnish the miners with all necessary mining tools and supplies for the purpose of opening the tunnel. The miners were to receive nothing in the way of wages but were to do the work upon their own account. Their sole compensation being as indicated. In that case, as in this they were not bound to work any specified length of time; there was no writing evidencing the contract; the evidence disclosed that they were re-

ferred to, among themselves and by other employees of the defendant, as partners, and were generally recognized as such. But the court held that such proof was insufficient to establish the peculiar character of the partnership necessary for the successful maintenance of the plaintiff's cause of action. Among other things, the court said:

> "The facts above recited do not prove the existence of a mining partnership. Under the sections of the Civil Code above referred to and to the authorities in which the nature of such a partnership has been considered, the ownership of an interest in a mine or the right to the possession thereof, or an option to purchase the same, is a prerequisite for the existence of such a partnership. Under section 2511 of the Civil Code:
>
> 'A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.'
>
> Under this definition the ownership or acquirement of a mining claim, or of at least an interest therein, and the actual engagement in working such a claim, are both essential before a mining partnership exists by reason of the joint interest of the partners in a mining claim. In the case at bar the alleged partners had no such interest when the alleged partnership was formed, nor did they subsequently acquire any. Their contract amounted to nothing more than the privilege of working upon a mine in which they neither had nor were to acquire any interest. It was a contract of employment."

The opinion in the case above further points out that certain authorities were relied upon holding that the fee of a mining claim was not necessary for the existing of a mining partnership, but in disposing of such contention the court said:

> "An examination of the cases cited by the text-writers discloses that the mining partnerships there involved were decreed by reason of the existence in the partners of some interest in the property, or of a right of possession in their own right, as distinguished from that of the owner. The recent case of Harper v. Sloan, 177 Cal. 174, 169 Pac. 1043, 181 Pac. 775, is cited by respondent, and is an example of similar cases. In that case the plaintiff acquired under his contract the privilege of purchasing the property, and conveyed to his associates a portion of the right. Such a contract vests in the holder thereof an equitable or contingent interest in the property itself. In Crowley v. Genesee Mining Co., 55 Cal. 273, the court construed a contract by which the plaintiff was employed to work in a mine belonging to defendant for the purpose of taking out what is known as 'tribute rock,' and delivering it at the defendant's quartz mine, to be crushed at its mill free of costs or expense to the plaintiff, and as compensation for his services one-half of the gross proceeds of each crushing was to be paid to the plaintiff. That contract was held to be a 'contract of employment under section 1965, Civil Code.' In Hudepohl v. Liberty Hill Consolidated Mining & Water Co., 80 Cal. 553, 558, 22 Pac. 339, 340, a written contract was executed by the superintendent of a mining company to plaintiff and an associate 'the right and privilege to work

> and mine' certain mining property; that the company was to make improvements necessary for commencing and carrying on the work; and that the other parties were to work and mine the ground and receive one-half of all the gross products as compensation. In construing that contract the court said:
>
> 'Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid by a share of the profits realized from such labor.' "
>
> Michalek v. New Almaden Co., 42 Cal. App. 736, 184 Pac. p. 56 (Cal.).

In the above case plaintiff had judgment in the trial court and it was reversed upon the ground that the verdict was not supported by the evidence in that no mining co-partnership was proved.

This decision is supported by the text-writers. In 17 California Jurisprudence, under the title "Mines and Minerals," the following propositions of law relating to mining co-partnerships are laid down:

> 106. Definitions and Distinctions.—A mining partnership is a qualified partnership relation which exists when two or more persons who own or acquire a mining claim for the purpose of working it or extracting the mineral therefrom actually engage in working such claim. Parties owning a claim as tenants in common are to be considered as partners in the working of it. The actual working of a mine by the owners for their mutual benefit is essential to the existence of the partner-

ship relation, but it is not essential that each partner shall actually perform physical work, since one who supplies money which is to be used in working a claim is as much engaged in such work as one who devotes his own labor to the enterprise, nor is it necessary that the property be owned in fee by the partners, if they have an interest therin, or a right to possession of the property or to acquire its ownership. Mining partnerships are to be distinguished not only from ordinary partnerships, which may be created by contract even if the business of the partnership relates solely to mines, but also from the relations which exist under a contract between a mine owner and another for working the mine on shares, or for a given price for ore mined and delivered, or for wages and an interest in the mine if it is found to be a paying mine, as well as a grant of an undivided interest in mining ground which conveys only a right to take mineral therefrom, or a contract to buy an interest in a mine.

107. Formation.

'An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.'

While no actual or express agreement is necessary, mining partnership may be formed pursuant to a contract between the parties, and recognized and established usage on the part of a firm should be taken as part of the contract of partnership. Thus an agreement between a mining claimant and another, that the latter will explore and develop the mine

> in consideration of tools and provisions and a share in the mine if it proves valuable, followed by a joint working of the mine and sharing of the profits, constitutes a mining partnership. Likewise, a mining partnership is formed where one who is in possession of a claim, under an option contract, transfers to another a share of his interest in consideration of a sum to be used by him in developing it, and continues in possession and the actual work of the mine. But a mining partnership is not formed by an agreement to operate a mine upon the happening of some contingent future event, or by an agreement which does not contemplate a joint working of the mine by the parties.
>
> (17 Cal. Jurisprudence, par. 106-107.)

An examination of the cases cited in support of the text, supra, will disclose that the doctrine announced in the Michalek case, supra, has had ample previous recognition by the courts of that state.

As already pointed out, the state of California enacted its statutory provisions relating to mining co-partnerships in 1872, the identical provisions whereof are incorporated in the Montana Codes, and it is a well recognized principle of statutory construction that we took these statutory provisions with the construction given them by the California courts.

We respectively take the position that there was a fatal variance between the allegations and the

proof in that the plaintiffs failed to prove themselves a mining co-partnership and, under the authorities above, and those cited, infra, under the assignment; Lease or License: Statute of Frauds, a judgment running to some of them as individuals, is fatal.

THE DECISION OF A MAJORITY OF MINING CO-PARTNERS GOVERNS:

It would seem that the foregoing discussion should put and end to this controversy; however, if this court should be constrained to hold that the parties named contracted with the company as a mining co-partnership, and not otherwise, then we call the court's attention to the provisions of section 8059 of the Revised Codes of Montana, of 1921. It reads:

> "8059. Owners of majority of shares govern. The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

The statement of the case discloses that Frank Tamietti and John Pagleero claimed no interest in this controversy, nor did they claim that there was due or owing to them anything whatsoever which had not been fully paid at the time of the termination of the contract, and their compensation consisted only of payment for moneys earned as royalties on ores already mined. They conceded the

right of the company to bring the contract to an end.

Lawrence Monzetti likewise acknowledge payment in full, and discharged the company from any further liability, but, he, of course, attempted to repudiate his agreement at the trial; however, a majority of the parties have no interest in this litigation, and it would seem that under the provisions of the statute, supra, the decision of the majority would be binding upon the remaining two in whose favor judgment was rendered; such would be the effect of the plain import of the language of the statute.

The point here raised appears to be one of first impression. The Supreme Court of Montana has on two occasions had this section under consideration; in A. C. M. Co., v. B. & M. Co., 17 Mont. 519-522, the point was raised as to the right of the owners of a majority of the shares or interests in a mining partnership to bind the partnership, but the court dismissed the matter from consideration for the reason that, under the facts as stated in that case, the court held a mining partnership did not exist between the parties. The section was again before the court in Boehme v. Fitzgerald, 43 Mont. 226. The proposition before the court being as to whether the death of a mining partner dissolved the partnership, the decision being that such a contingency did not work its dissolution,

and expressly held that the partners owning a majority interest were entitled to the management and control; and it would appear that an accounting between the partners is the proper remedy for relief.

It is disclosed by the testimony in this case as appears in the statement, supra, that two of the parties, Frank Tamietti and John Pagleero, mined all of the ores in the territory in dispute after the alleged contract had terminated, and were paid therefor, and the point suggests itself that if Batt Tamietti and Gaido, the parties now before the court, have any cause for redress then, if a mining partnership actually existed between the parties, their remedy would be for an accounting and not an action at law against the company for loss of alleged prospective profits.

ASSIGNMENTS 1, 2, 5 AND 7.

LEASE OR LICENSE: STATUTE OF FRAUDS.

The evidence in this case, as disclosed in the statement of facts, does not prove a contract complete in its terms. There is a lack of mutuality, in that the so-called mining partners were not required absolutely to mine any of the ground which they claim was leased to them. The company under the terms of the alleged contract could not compel either specific performance of the contract or claim damages if the parties refused to fulfill their part of it. They were not obliged to do anything.

Furthermore, no time was specified for its performance, they did not have exclusive possession, and, as already pointed out, plaintiffs claim a sublease in the nature of a grant under an oral contract not evidenced by any note or memorandum in writing. This being true, it is our contention that the plaintiffs held under a license revocable at the pleasure of the licensor, and not as lessees or grantees of any part of the Goldsmith mine, and it is submitted that the contention we here advance finds universal support by the courts as well as the text writers.

A leading case, much cited by the courts, bearing upon the distinction between the effect of a license to enter lands uncoupled with an interest, and a grant is that of DeHaro vs. United States, decided by the Supreme Court in 1866, and since adhered to by all courts and text-writers who have dealt with the subject.

In that case the court laid down the following:

> "There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while

it remains unrevoked, is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property discendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes of 2d Hare & Wallace's American Leading Cases, commencing on page 376.* We are not aware of any difference between the civil and common law on the subject."

DeHaro vs. United States, 5 Wall, 599-627.

The same doctrine is incorporated in the text under the title "Mines and Minerals," 27 Cyc., page 690, and in the accompanying note in its support, both State and Federal, as well as English and Canadian cases are cited.

Among said decisions is that of Clark vs. Wall, 32 Montana, 219, upon which comment will be made hereafter.

Ruling Case Law, likewise draws the distinction between a lease of mines and a license to work the same, in the following language:

"97. License to Mine: Distinguished from a lease.—A distinction is drawn between a lease of mines and a license to work mines is that a lease is a distinct conveyance of an actual interest or estate in lands, while a license is a

mere incorporeal right to be exercised in the lands of another, or a profit a prendre, which may be held apart from the possession of the lands."

18 Ruling Case Law, page 97.

As to the requisites of a grant under a mining lease, it is laid down in Cyc:

"A mining lease authorizing the grantees to extract and appropriate minerals from the land is a grant of a part of the land, and must be executed in the same manner as a deed."

27 Cyc., page 692.

To the same effect is the text in California Jurisprudence, Vol. 17, title, Mines & Minerals, sections 100 and 101, and cases cited in support thereof:

"SEC. 100. LICENSES.—A clear distinction exists between a mining lease and a license has no permanent interest, property or estate in the land, but only in the proceeds thereof, as personal property, and his possession is the possession of the owner. A license is a mere personal privilege, which is not assignable. It does not create the relation of landlord and tenant, nor constitute a covenant running with the land, nor work a breach of warranty of title, but it is subject to revocation by the licensor, and is revoked by a conveyance of the owner's interest. A verbal license to mine for an indefinite time may be revoked at the will of the licensor, and constitutes no defense to an action by the licensor to enjoin the licensee from working the mine. A license, of course, is limited by the interest of the licensor."

"SEC. 101. EMPLOYMENT UPON SHARES.—A contract by which persons are

> engaged to work a mine in which they neither have nor thereby acquire an interest, for a share of the proceeds or a given price for ore taken out and delivered, is a contract of employment. Thus it has been held that a contract employing one to work in a mine and to take out and deliver rock to a mill, for one-half of the gross proceeds of each crushing, is a contract of employment under Section 1965 of the Civil Code, defining contracts of employment. Similarly, an agreement by a mining company, although in the form of a lease, giving the lessee a share of the proceeds for working the mine and bearing all expenses, except necessary improvements, is an agreement for working on shares, and the parties become tenants in common of the products taken out; such a contract, although denominated a lease, does not create the relation of landlord and tenant, but merely fixes a rule of compensation for services, being essentially a contract for labor to be paid for by a share of the proceeds."

In the case of Clark vs. Wall above referred to, the court had under consideration the effect of oral agreement authorizing the entry into a mining claim for the purpose of extracting ore therefrom during the plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever the plaintiff might desire.

The facts in the case referred to differ from those here alleged that in under plaintiff's complaint, claim is made to certain definite portion of the Goldsmith Mine, but the doctrine announced by our court in the Clark vs. Wall case we contend has peculiar

applicability to the present controversy between the parties to this action. The court among other things said:

> "What was the effect of the agreement under which the defendants entered into possession of the Modock Claim? The question can be determined without difficulty. The case of Wheeler vs. West, 71 Cal. 126, 11 Pac. 871, was an "action to perpetually enjoin defendantts from extracting and removing gold from the mining claim of plaintiffs." and the court said:
>
> "The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine if they saw fit, and to exercise their own discretion whether they worked it or not, did not create the relation of landlord and tenant between them and the plaintiffs. The contract gave to them no greater right and had no more force in law than a verbal contract for the sale of the land would have possessed. Their right under such a contract was not in and to the realty, but to the gold, as personalty, when it should be severed from the land. Had it been in writing, it would have given to defendants merely an incorporeal hereditament, and, being verbal, it operated as a license to them to dig and mine for gold within the specified limits, which license protected them from a charge of trespass while in force, but was liable to revocation at the will of the licensors. There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as

personal property, and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner (Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Frank v. Haldeman, 53 Pa. St. 229; Gillette v. Treganza, 6 Wis. 343; Grubb v. Bayard, 2 Wall, Jr., 81 Fed. Cas. No. 5849; Caldwell v. Fulton, 31 Pa. St. 483, 72 Am. Dec. 760; Doe v. Wood, 2 Barn & Ald, 719; Potter v. Mercer, 53 Cal. 667). The agreement was revocable at the will of the plaintiffs, and having been by them revoked before suit was brought plaintiffs were entitled to a recovery."

The authorities cited in the above opinion support the doctrine announced by the court, and we quote from Riddle v. Brown, supra: "A license merely—a verbal license—is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it (Doe v. Wood, 2 Barn & Ald, 724; 1 Crabb R. P. 96). But such a license is revocable at any time, at the pleasure of him who gives it." (See also Lindley on Mines, 2d ed., Sec. 860; William v. Morrison (C. C.), 32 Fed. 177.)

Clark v. Wall, et al., 32 Mont. pp. 219-227.

In a later case, that of Ivey v. LaFrance Cooper Company, 45 Montana, page 71, the facts alleged find some similarity to the facts in the case at bar. It was there contended that the plaintiff entered into an oral agreement with the defendants where-

by they leased and let to him a certain piece of ground under and within the Lexington Quartz Lode Mining Claim situated in Silver Bow County. Under the terms of the lease plaintiff was to clean out an old drift, retimber the same, extend it for a distance, if necessary, and cut an uprise to a place where ore would be encountered. After striking ore he was to have all he could take out for the succeeding thirty days.

It was contended that this so-called lease was void under the statute of Frauds and this point was conceeded by opposing counsel, for the court in its opinion says:

> "1. It is contended that the so-called lease, not being in writing, was void under the statute of Frauds. This position is taken on the authority of Clark v. Wall, 32 Mont. 219, 79 Pac. 1052, and the point seems to be conceded by counsel for the respondent."

At least five sections of the Revised Codes of Montana of 1921 have bearing upon the issues. They are: 7593; 7519, sub-division 5; 7939 of the Civil Code, and 10611 and 10613, sub-division 5, of the Code of Civil Procedure.

Section 7593 provides:

> "No agreement for the sale of real property, or any interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing; but this does not abridge the power of

> any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

Under this section it will be observed that the sole exception relates to the inherent powers of a court of equity to compel specific performance in proper cases. The exception can have no possible applicability to the case at bar. We are not proceeding here upon the chancery side of the court but are defending the law action for damages for breach of contract.

Sub-division 5, of Section 7519, reads as follows:

> "An agreement for the leasing for a longer period than one year, or for the sale of real property, or for an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

It will be noted here that only leases for a longer period than one year shall be in writing, the implication being that leases for a shorter period may be oral and valid, and plaintiffs, in the fourteenth paragraph of their complaint, seek to bring themselves within this exception, for they specifically allege that the ore body covered by their alleged lease and which they could have mined would have been mined by them within thirty days after they were ejected, and that all the ore to which they were entitled would have been mined by them within a

period of ninety days after the 16th day of January, 1922, the day on which their so-called sub-lease was cancelled.

The exception regarding a lease for a lesser period than one year is also found in sections 10611 and 10613, above referred to.

It should not be difficult to determine that the exception respecting leases adverted to cannot avail the plaintiffs in this action. The reasons are so glaringly apparent that it would seem that little argument is necessary and the citation of authorities much less so to show the fallacy of plaintiff's position. They do not claim a lease as that term is generally understood, that is to say, under a right to the possession and occupancy of premises for a term to be returned without substantial dimunition or destruction of the freehold at the end of the term, but they do claim a specific grant or a part of the land itself which involves an utter destruction of that part of the fee simple estate covered by the alleged lease.

The authorities adverted to above point out this distinction, but the following succinct statement by the Circuit Court of Appeals of the Eighth Circuit, in Westerling v. Black Bear Mining Company, 203 Fed. pp. 599-604, makes the distinction quite clear:

> "An ordinary lease for years grants nothing but the occupancy and use of the premises and requires their return without substantial diminution of the property of its value at the end

of the term. But this mining lease is not of that class. It conveys the right to take from the body of the property all its value and to leave it at the end of the term a worthless shell.

A mining lease is a grant in presenti of all the minerals in the land—these minerals being part of the realty—with the right to enter and search for them and to mine and remove them when found" Brewster v. Lanyon Zinc. Co., 140 Fed. 801, 807, 72 C. C. A.

203 Fed. pp. 599-604.

Under the title "Licenses," in 17 Ruling Case Law, p. 506, the rule is again laid down that persons who have the privilege of entering on the land for a definite purpose, and whose payments for the use of the land are determined by the quantities of materials obtained are licensees and not tenants, and on page 570 the distinction drawn by the courts between mining leases and licenses is thus set forth:

"A clearly defined distinction is drawn by the authorities between agreements which create a lease of the land for mineral purposes and those which are simply a license giving to the licensee authority to enter and operate for minerals. While under a lease an interest or estate in the land itself is created, under a license the licensee has no interest or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty, but as personal property, and his possession is the possession of the owner. In general, a contract imply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold."

17 Ruling Case Law, p. 57, Sec. 83.

Section 860 of Lindley on Mines reads, in part, as follows:

> "Licenses and their distinguishing attributes. A license is an authority to go upon the land of the licensor to do an act or series of acts there, but passes no estate or interest in the land.
>
> It is technically an authority to do something on the land of another without passing an estate in the lands, while the latter confers a mere incorporeal right, to be exercised in the lands of others. * * *
>
> A mere grant of a right to take ore, no estate or interest in the land being granted, is a license only, and is not exclusive of the licensor, unless the expressed intention of the parties is otherwise, or the implication is so clear and strong as to be unavoidable.
>
> A license is revocable, and its continuance depends upon the will of the grantor."
>
> Lindley, Third Edition, Vol. 3, p. 2129, Sec. 860.

Notwithstanding plaintiffs' claim that they hold under a parole grant in the nature of a lease the foregoing authorities clearly establish their rights as licensees and not as lessees for the relationship of landlord and tenant never did exist.

The leading Montana authority on the rights of a licensee and the authority of the licensor to determine the license at his pleasure is that of Great Falls Water Works Company against Great Northern Railroad Company, found in 21 Montana 487, the opinion of the court being by Mr. Justice Hunt.

That was an action for injunction to restrain the Railway Company from tearing up certain water mains laid by plaintiff from its pumping station on the Missouri River to connect its general water system at the city of Great Falls. The case in the lower court was tried before Judge Leslie, who found in favor of the plaintiff, but the cause was reversed.

The Water Company, it appears, had a franchise with privilege of laying mains in the streets and alleys of the city. They held under a deed but claimed an oral modification whereby they were permitted to change the course thereafter adopted by them, and did so change it. The Railway Company. being the owner of the fee, undertook to tear up the water mains of the Water Company where they crossed its property.

The Supreme Court, after laying down the proposition that the decision of the trial court in effect granted an easement to the Water Company without deed, and in violation of the statute of Frauds, laid down the following propositions, which have become the recognized rule of law in this jurisdiction:

> "There has been much contrariety of decision in the courts of different states and jurisdiction. But the courts of this state have upheld with great steadiness the general rule that a parol license to do and act on the land of the licensor, while it justifies anything done by the licensee before a revocation, is, nevertheless, revocable at the option of the licensor; and this,

although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of the lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdictions of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed than to leave it to the chancellor to construe an executed license as a grant depending upon what, in his view, may be equity in the special case.

Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription—which is equivalent to a deed—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in Wood v. Leadbitter, supra; Browne, Statute of Frauds, Sec. 29.

An extended examination of cases bearing upon the doctrine of the revocability of parole licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning, sustains the rule that a parole license of the character of the one under consideration

is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes. Freeman's note to Lawrence v. Springer, supra. Modern text-writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so essentially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estoppel is inapplicable, 'inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril.' Browne on St. Frauds (5th Ed.), Sec. 31; Jones on Easements, Sec. 69."

Great Falls Water Works Company v. G. N. Ry. Co., 21 Montana, pp. 487, 506.

The principles of the Great Falls case were again reiterated in the later case of Archer v. C. M. & St. P. Ry. Co., 41 Montana, p. 56.

In the Archer case the right of the plaintiffs to maintain a dam and ditch upon certain lands acquired by the Railroad Company for right of way purposes by deed from the owners was denied because the facts showed that while the plaintiffs had constructed their dam and ditches at considerable toil and expense and had maintained the same for a number of years, still their possession was that of licensees merely, because at its inception the right of plaintiffs was merely resting in parole and was

not coupled with an interest in the land itself. Further, that the license may be terminated without notice, with the single exception that where the licensee has movable property on the premises he should be given a reasonable notice of the revocation of the license and an opportunity to remove the property.

The facts in the case of Wheeler against West, 11 Pac. 871 (Cal.), were in the essential features similar in legal effect to the facts pleaded and attempted to be proven in the case at bar. The case was decided in 1866, and quoted from at length in the case of Clark v. Wall, supra, 32 Mont. 219, 224. The Wheeler case was before the Supreme Court of California on a second appeal, because after it was reversed, the defendants amended their complaint and plead the contract **in haec verba.** In the trial court the essential elements of the alleged contract were stricken on motion and the court reaffirmed its former decision, holding the contract to be a mere license.

Wheeler v. West, 20 Pac. 745.

In Hudepohl v. Liberty Hill Consolidated Mining, etc., Co., 22 Pac. 339, the Supreme Court of California again had before it a similar question. This case was decided in 1889. It was an action on a promissory note. The defense was lack of consideration. Plaintiff had judgment and defendant appealed. The court found that the defendant, being

a corporation, entered into a contract in writing with the plaintiff and one Buckman through its superintendent. To show the similarity of the contract in that case with that now before the court, we here set it out for the convenience of the court:

> "Know all men by these presents: That I, S. Wheeler, superintendent of the Liberty Hill Consolidated Mining & Water Company, for and on behalf of said company, have leased, and by these presents do lease, to C. Hudepohl and B. S. Buckman, for the term of one year from the date hereof, the right and privilege to work and mine the ground at or near Little New York in Nevada County, Cal., known as the 'Empire' and "Manzanita' claims, on the following terms and conditions, to wit: The said Liberty Hill Company to make all the improvements necessary for commencing and carrying on the work of mining. Said improvements to consist of putting in flumes and under-currents in Scott's ravine, and a short piece of flume in the Big Tunnel, emptying into said ravine; to furnish sufficient iron pipe and hydraulic machines, and all the water in what is known as the 'Lower Bear River Ditch'; in consideration for which the said Hudepohl and Buckman are to work and mine the said ground in an energetic and workman-like manner, bearing all the expenses for the same, and to have and receive one-half of all the gross products thereof, including lease of cuts, tunnels, flumes, and bed rock, which they may have run through and over during the existence of this lease. The other half of such gross product to be paid over to the said Liberty Hill Company immediately on clean-ups or leases or sales being made. Prior to each and every clean-up being made, the su-

> perintendent of the Liberty Hill Company shall be notified thereof in time to be present if he choses and he shall have the custody of all the bullion and the other product until a division be declared. In witness hereof I have hereunto subscribed the name of the corporation, this October 10, 1881."

The defense was that the contract was never ratified by the stockholders of the company; that the plaintiff and Buckman worked the mines described in the contract and delivered the bullion to Wheeler, the superintendent, who deposited it with the bankers, and drew on them to pay the expenses of mining, including wages of hired help, and when they ceased working there remained in the hands of the superintendent a sum of money, being plaintiff's half of the proceeds of the mines taken out by them, and that the note sued upon was given for that sum instead of delivering to them the money or bullion itself; that the officers of the corporation were authorized to execute the note; that Buckman assigned his interest in the note sued on to the plaintiff before the suit was commenced.

The court did not decide the question as to whether the contract required the ratification of the stockholders fo the company, and in disposing of the point laid down the following propositions of law:

> "If the agreement be construed to be a lease of the real estate of the defendant, it may be conceded that the point made against its validity would be well taken; but we do not regard

it as a lease. It is true the parties so term it in the instrument itself, but that cannot affect its legal construction. As we construe the agreement, it was one for the working of the mine on the shares, and the parties became tenants in common of the products of the mine when taken out. Bernal v. Hovious, 17 Cal. 545; Smyth v. Tankersley, 20 Ala. 212; Ponder v. Rhea, 32 Ark. 435; Somers v. Joyce, 40 Conn. 592; Scott v. Ramsey, 82 Ind. 330; Dinehart v. Wlison, 15 Barb. 597; Aiken v. Smith, 21 Vt. 172; Haywood v. Rodgers, 73 N. C. 320. Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor. Civil Code, Sec. 1965; Crowley v. Mining Co., 55 Cal. 273; Gardenhire v. Smith, 39 Ark. 280; Jester v. Penn. 28 La., Ann., 230; Adams v. McKesson's Ex's., 53 Pa. St., 81; Hoy v. Gronovle, 34 Pa. St., 9."

The doctrine of the Hudepohl case was recognized as sound law as late as 1917 by the Court of Appeals of the Second Circuit, in re Seward Dredging Co., 242 Fed. Rep. 225. In that case it appeared that the dredging company was a bankrupt and owned a placer mining property in Alaska, which for the purpose of a decision was treated as real estate. The bankrupt had made a contract with one Estabrook to the effect that he should take possession of the mine, furniture, machinery and material to work it and himself extract gold, keeping accounts of receipts and expenditures; at the end of the first

summer's work Estabrook was to have the right or option of enlarging and continuing his operations on a royalty basis, but if he didn't find the enterprise to his liking, the contract was then to terminate, the accounts between the contracting parties were to be stated on certain terms, whereby the cost of operation should be credited to Estabrook and the gold recovered credited to the bankrupt. If the balance was against Estabrook, he was to pay the same to the bankrupt, but if the value of the gold was less than the cost of plant and operation the bankrupt was to pay Estabrook the difference and thereupon all of the improvements were to become the property of the bankrupt. Estabrook didn't exercise his option to continue operations; that while he did operate, the gold recovered didn't equal his expenditures and the difference was not paid by the bankrupt, who before bankruptcy resumed possession of the property; that Estabrook failed to remove his machinery therefrom, which passed to the physical possession of the trustee in bankruptcy, and into the custody of the bankruptcy court. Estabrook's property at the mine consisted in large part of chattels, one of them being an oil burning combustion engine, which was bolted to a concrete bed contained within a house. The trustee in bankruptcy, having refused to surrender any of Estabrook's apparatus, he filed his petition to compel delivery to him of the chattels, the contention being that if

he were entitled to the engine he would be enitled to all. The District Court of the United States for the Southern District of New York gave him the relief prayed for, and upon appeal to the Circuit Court it was held:

> "It is not true that the contract between Estabrook and the bankrupt was a conveyance in the sense that it transferred anything that could be called realty or constituted a lease. An agreement exactly similar in legal effect was held not a lease, and no more than a contract for labor to be performed, merely fixing compensation for services rendered, in Hudephol v. Mining, etc., Co., 80 Cal. 553, 22 Pac. 339, in which case the document considered was called a lease by the parties, a fact taken into consideration merely as evidence of ignorance. There, as here, the contractor was formerly given possession of the mine, a fact which made him no more than a licensee.'
>
> In re Seward Dredging Co., 242 Fed., 225, 228.

Indeed, the doctrine we contend for appears to be now so firmly established that in the case of Michalek v. New Almaden Co., from which we have so extensively quoted above, it was admitted at the trial that the contract involved evidenced a license and not a lease. Citing DeHaro v. United States, 5 Wall, 599, 627, 18 L. Ed. 681.

The case of Shaw v. Caldwell, 155 Pac. 941, was heard by the District Court of Appeals, Third District, California, in 1911, and a rehearing denied by the Supreme Court of that state. It follows the

earlier decisions of that state to the effect that a license is nothing more than a personal privilege, is revocable at the pleasure of the licensor, and even where it is created by a written instrument or conferred by deed, it does not affect the rule of revocability at the option of the licensor. Citing 25 CYC. 644. It is not here necessary to dwell upon the facts in that case, but the court, after reviewing the facts, thus discriminates between a license and a lease:

> "The situation is clearly brought within the definition of a license in respect to real estate, which is an authority to do a particular act or series of acts upon the land of another without possessing an estate therein. 25 CYC. 640. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privelege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument."
>
> Shaw v. Caldwell, 115 Pac. 941-943 (Cal.).

Question: Did the alleged contract under which recovery is here sought give to the parties exclusive possession of the premises against all the world, including the owner, or did it confer a privilege to occupy under the owner? The statement of the case as pointed out contains all of the evidence pertaining to the alleged contract between the parties, denominated a lease. They entered the premises

to mine certain designated territory upon a royalty basis. Thy were first to sink a winze 15 feet down, which was already 35 feet deep. They then had the right to extract all the ores found on both sides, east and west, from the depth of 50 feet up to the 500 foot level, and if they worked north or south they would have a right to take out any ores there found also. They were to mine all of the ores as far as it went. The company was to furnish machinery, tools, supplies, etc., and to hoist the ore and waste from the 500-foot level. After sinking in the winze to about 45 feet, they struck ore and continued to sink to a depth of about 51 or 52 feet, which was deeper than the contract called for. Alderson, the superintendent, generally went down every day. The ore was going down and they asked permission of Alderson to sink deeper on the lead, and Alderson said, "Sure, he said, down in this winze," he said, "until the ore is gone; the more you sink the more ore you are going to have up over your head, and you fellows are going to make money and the company is going to make money (Tr. 57-127). So they sank until they were 75 feet deep, when they came to a fault, and, according to Batt Tamietti, the partners agreed to sink no further and that it would be better to notify Alderson that they intended to quit, and did notify him, but Alderson went down the next day and gave them directions concerning the sinking of a sump, and then extracting

the ore east and west from the lead (Tr. 57-58). Gaido's testimony is of like import, as is that of Monzetti. The testimony, we submit, if it proves anything, proves positively that the alleged partners did not receive a grant of any part of the mine. Certainly not in any sense as alleged in the complaint; that is to say, from the 500 foot level 50 feet downward and easterly and westerly along the lead to the east boundary of the mine, and westerly to the west boundary line of the mine; but in such parts of the mine as Alderson, the superintendent and manager, directed. Their possession, instead of being exclusive against all the world, including the owner, clearly discloses that it was in subordination of the owner and at such places in the mine as the owner from time to time directed. They occupied under the owner with the privilege of working such parts of the mine and such only as the owner designated, and that the parties didn't feel themselves bound by any mutual contract while they were working in the mine is amply demonstrated by the testimony of Batt Tamietti, above referred to, that they notified the manager, Alderson, that they were going to quit after having struck the fault, after having sunk the winze 75 feet below the 500-foot level of the mine.

When this cause was tried, Alderson, the manager, was dead. The company could not combat the contentions advanced by the alleged partners, and it is

submitted that under conditions such as arose in this case, the so-called partnership might with equal propriety have claimed the whole mine. We submit they had only a working agreement in the nature of a license, such as it is the custom in the mining districts of the northwest to give to miners. Such contracts are more alluring to the miner than a fixed daily wage. Experience has demonstrated that miners working for wages are often more solicitous for their own comfort and welfare than for that of the employer, but where they have a working agreement which gives them a share of the profits, it spurs them on to greater effort, both for their own material benefit and profit to the employer. The contract contended for being one involving the corpus of the property itself, is void under the statute of frauds.

In addition to the authorities already cited, we call attention to the early case of Hirbour v. Reeding, 3 Mont. pp. 15, 20, decided in 1877, wherein our court having under consideration the question of the statute of frauds, held that as between the members of a partnership they may contract orally with each other, but as between the partnership and third persons the statute of frauds in all cases operates.

We quote from the opinion as follows:

> "The Supreme Court of Indiana holds in Holmes v. McCray, 51 Ind. 358, that a parol agreement for a partnership for the purpose of dealing in lands is not within the statute of

frauds. Chief Justice Biddle, in the opinion, says: 'As between the partnership and its vendors, or vendees in the sale or purchase of lands, the statute in all cases would operate, but as between the partners themselves, when they are neither vendors nor vendeses of one another, we cannot see how the statute can affect their agreements.'

"In New York, the same views are announced in Chester v. Dickerson, 54 N. Y. 1, and Fairchild, 65 id. 471. Chief Justice Wade, in his concurring opinion, quotes from the opinion of the court in Chester v. Dickerson, supra, and this reference is therefore sufficient."

Hirbour v. Redding, 3 Mont. 15-20.

As already pointed out, the authorities hold strictly to the doctrine as laid down by this court in Kjelsberg v. Chilberg, 177 Fed. 110-112, that "a lease of a mine is a grant to the corpus of the property. It confers the right to take out a part of the value of the property."

Not only did the so-called partnership fail to produce any note or memorandum, in writing, of the contract, but under the instructions of the court (Tr. 192-193) the plaintiffs were required to prove their entire case by a preponderance of the evidence.

Th contract, whatever its import, was made with the agent Alderson. If the contract itself was required to be evidenced by some note or memorandum in writing, then the authority of Alderson to enter into it was also required to be in writing.

Section 7939 of the Revised Codes of Montana, 1921, provides as follows:

> "7939. Form of authority. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Corporations are bound only by such agreements as are made by its governing body and by its agents thereunto duly authorized express authorization must be shown to have been given.

> Kirkup v. Anaconda Amusement Co., 59 Mont. 460-482-3, 2 Fletcher on Cor. S. 1242;
> Berlin v. Bell Isle Scenic Co., 105 N. W. 130 (Mich.);
> M. L. Ins. v. Robinson, 49 N. Y. S. 887;
> Moore v. Skyles, 33 Mont. 146;
> Trent v. Sherlock, 24 Mont. 255;
> Butte & B. v. MOP., 21 Mont. 529.

Throughout the transcript it will be found that all testimony went in over the objections of counsel for the company, and exceptions were reserved. However, they are not included in the assignment of errors for we deem that under Specification No. 1, being the motion for a directed verdict, and the remaining specifications, the entire record is before the court for review. The points we now urge were presented to the trial court and we have have great deference for the learned manner in which the Honorable Charles N. Pray, trial judge, disposed of the

case. However, it is quite manifest that a trial court sitting with a jury, and especially one presided over by a judge newly appointed, has not the time to give serious problems of law the consideration which they justly merit. The court, in deciding to permit the case to go to the jury, was influenced, we believe, by the decision of Pelton v. Minah Consolidated Min. Co., 11 Mont. 281, and the case of Kjelsburg v. Chilberg, a case decided by this court and reported in 177 Fed. 109. We are prompted to this conclusion because these cases, as our recollection serves us, were the ones relied upon by counsel for the alleged co-partners at the trial. At first blush they appear to support the contentions advanced by counsel for the alleged partnership, but upon analysis it will be found that neither of them is at all in point, In the Pelton case there was a written contract, while the contract here sued upon rests in parole. That contract was for a definite term of one year, while in the case at bar no term is specified. In that case the contract was for the exclusive possession of a mine, while here the contract was only for such portions of a vein in the mine as its superintendent from time to time designated, and was at all times under the superintendency and control of the mine manager. There the lessee assumed to exercise absolute dominion and control over the mine; the lessee there was in complete and undisturbed possession, while here possession was under

and in subordination of the company. With these distinctions in mind, the court properly held the instrument before it in that case to be a lease, since it contained all of the elements which constitute a lease of a character common to the mining regions of the state of Montana, and contained no provisions or conditions whereby it could be held to be a contract of any other nature.

Pelton v. Minah Con. Min. Co., 11 Mont. 281.

The Kjlsburg case is likewise not in point. The statement of facts discloses:

> "The defendant in error brought an action against the plaintiff in error to recover damages for breach of an agreement to lease to the defendant in error a certain placer mining claim belonging to the plaintiff in error. The plaintiff alleged that the parties to the contract had been co-partners in business at Nome, Alaska; that they dissolved their partnership, and in part consideration of the surrender by the defendant in error of his interest in the co-partnership, the plaintiff in error agreed to execute to him a lease of the mining claim for one year upon a royalty of forty per cent; that the plaintiff in error failed and refused to execute the lease, and instead thereof executed a lease of the claim to another, so that the defendant in error was prvented from working the said claim; that the defendant in error could and would have extracted from the ground, over and above the royalty to be paid to the plaintif in error, and the necessary expenses of working the mine, gold dust of the value of $50,000.00. For that sum he demanded judgment. On the trial

before a jury, verdict was returned for the defendant in error in the sum of $2,000.00, for which judgment was rendered.

"The plaintiff in error contends that there was not contract proven by the record which would entitle the defendant in error to damages for its breach. There was no motion for an instructed verdict. There was no testimony to contradict in any way the testimony of the defendant in error as to the terms of the contract. He testified that the plaintiff in error said, 'I will make you out a lease of the Metson Bench'; that the terms were that the royalty was to be 40 per cent, and that the lease was to commence on the first of September, 1905, and run to the middle of June, 1906. This was sufficient evidence of the term of the lease. Under the instructions of the court, the jury found that the contract to give the lease had been made as alleged."

From the foregoing statement it is quite apparent that there was an absolute contract between the parties to make and execute a lease and not a license. The term was specified and it was for less than one year, and therefore the statute of frauds could not be held to apply. It was for an entire mining claim and we must assume that it was for the exclusive possession thereof in the lessee, as against all the world, including the lessor. The testimony was uncontradicted that the plaintiff in error said, "I will make you out a lease of the Metsen Bench." The rent was specified (i. e. royalty) and the term was fixed.

Kjelsburg v. Chilberg, 177 Fed. 109.

As said in Shaw v. Caldwell, supra, the above case shows that the lessor was to give the lessee exclusive possesion of the premises against all the world, including the owner, and this court could not therefore find otherwise than that the plaintiff in error was guilty of breach of contract for failure to execute a lease and was therefore amenable in damages to the defendant in error, for the value of his bargain. The points we urge in the case at bar were not before the court in that case. There was no motion for an instructed verdict.

ASSIGNMENT NO. 2.

Error is here predicated upon the refusal of the court to give the company's proffered instruction to the effect that the contract sued upon is in all essential features a contract for labor to be performed, and to be paid for by a share of the profits from such labor, and that the plaintiffs in the case had been paid for all of the labor performed by them under the contract, except $11.43, due, owning and unpaid to Pete Gaido, and a like sum to the plaintiff, Batt Tamietti, which sums, with accrued interest had been paid to the clerk of the court for the use of the plaintiffs, prior to the trial, and that therefore a verdict should be rendered for the company.

As pointed out in the statement at least three of the parties regarded the contract as one for labor

to be performed and to be paid for by a share of the profits of the venture. Indeed, Frank Tamietti expressly referred to it as a working agreement which was terminated on the 16th day of January, 1922 (Tr. 172), and, on the same page, testified: "We got fifty feet more ground than we asked for."

It will be observed by a reference to the cases cited under the assignment "Lease or License: Statute of Frauds," supra, that the Supreme Court of California, as well as other courts, including the Supreme Court of Appeals of the Second Circuit, hold such contracts in all essential features to be a contract for labor to be performed.

> Hudepohl v. Liberty Hill Con. Min. & Water Co., 22 Pac. 339;
> In re Seaward Dredging Co., 242 Fed. 225.

The California courts hold such contracts to fall within the definition of section 1895 of the Civil Code of that state, which is identical with section 7756 of the Revised Codes of Montana, of 1921, which section reads as follows:

> "7756. Employment defined. The contract of employment is a contract by which one, who is called the employer, engaged another, who is called the employee, to do something for the benefit of the employer, or of a third person."

Such a contract may be terminated at the will of either party as provided by the terms of section 7789

of the Revised Codes of Montana of 1921, which reads as follows:

> "7789. Termination at will. An employment having no specified term may be terminated at the will of either party, on notice of the other, except where otherwise provided by sections 7756 to 7809 of this code.'

None of the exceptions contained in this section having any application whatsoever to the case at bar.

It is true that whether in a given instance a contract is to be construed as a contract of employment or as a lease is, under the authorities, to be determined by the terms of the contract itself, its object and the intention of the parties as gathered from the circumstances surrounding the transaction.

26 Cyc. 975.

But as pointed out, supra, the contract sued upon in this case cannot in any sense be a lease. The provisions of the Statute of Frauds were not complied with, and because this is not an equity action seeking relief upon the ground of part performance sufficent to take the case out of the statute, the law presumes that the parties entered into the alleged contract with a full understanding of the law's requirements regarding contracts which must be evidenced by some note or memorandum in writing having dealt orally anent the transaction it is presumed that the parties intended the contract to be a license rather than an inerest in the corpus of the mine.

Howe's v. Barmon, 81 Pac. 48 (Idaho).

Indeed, plaintiffs proofs show beyond cavel that the contract was nothing more or less than a license to enter the mine under a working agreement, the compensation to be a share of the profits. That the relationship of master and servant at all times existed between the company and the so-called partnership is demonstrated by plaintiffs' exhibits of the smelter returns (Tr. 61 to 88, inc.). Thus we find the following deductions from the "leasers" share of the proceeds on different cars shipped:

> Hospital dues, 6 persons, $6.00; Industrial Accident, 6 persons, one-half month each, $7.80 (Tr. 65).
>
> Industrial Accident and Hospital dues for 6 persons for October, $21.60 (Tr. 68).
>
> Hospital dues, 6 persons, November, $6.00; Industrial Accident, 6 persons, November, $15.60 (Tr. 71).
>
> Hospital dues, $6.00; Industrial Accident, 6 persons, $15.60; total, $21.60 (Tr. 18).
>
> Hospital dues, 6 persons, $6.00; Industrial Accident, 6 persons, ½ month each, $7.80 (Tr. 82).

But one deduction may be drawn from this testimony: It is that the company carried Industrial Accident Insurance and made provisions for hospital services for the so-called partnership. These matters were not a part of the original contract as testified to by the parties. If they operated under a mining lease, it was not incumbent upon the company to make provision for industrial accident in-

surance or hospital dues, and we must assume the company was not charitably inclined to do so, but that these provisions were made solely by reason of the obligation imposed by law upon the employer to insure his employees and to private hospital service under the provisions of the Workman's Compensation Act, making it obligatory upon the employer to do these things for the employee.

The measure of damages in cases such as this is for work, labor and services performed, the remuneration being disclosed by the smelter returns. In this case it appears from the returns that Tamietti received as his share nearly $1,500.00 and Gaido over $1,500.00, and that only the small balance paid into court for their use and benefit remained unpaid.

In the Michaelk case, supra, the relief was wholly denied for work, labor and services which had been performed, because the suit being by the partnership and the proof having failed to disclose a mining partnership, there was a fatal variance. In the case of Clark v. Wall, supra, the court held the measure of damages in a case involving a verbal license to be governed by the property right in the ore which has actually been dug under the license. In the case of Ivy v. LaFrance Copper Company, 45 Mont. p. 71, the doctrine announced in the Clark v. Wall case was affirmed and recovery limited to work, labor and services on ore knocked down prior to the revocation of the contract. In this case the plain-

tiffs claimed no right to the ore in place but only to a share of the net proceeds after it had been mined, and even though the proof shows that some additional work was done and time and labor expended in mining of the alleged ore body, the courts uniformly hold that recovery may not be had.

> Note to Pifer v. Brown, 49 L. R. A. 497, and note to Keager v. Tuming, 19 L. R. A. (N. S.), p. 700.
>
> See also, Riddell v. Brown, 56 American Decisions, p. 202 (Ala.) wherein the court stated:
>
> "Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it: Doe v. Wood, 2 Barn & Ald. 724, Crabb R. P. 96. But such a license is revocable at any time ,at the pleasure of him who gives it."

Where defendant admitting plaintiffs' damages in a certain amount has paid such amount into court, and it is enough to cover the reasonable damages therefor, non-suit is proper.

Harrington v. Moore Land Co. 59 Mont. 421.

It is respectfully submitted the court erred in refusing to give this proffered instruction.

ASSIGNMENT 3-4-6-7.

ON THE RIGHT TO RECOVER MORE THAN NOMINAL DAMAGES:

These specifications may be considered together. The third refers to the deposit in court covering

moneys due Gaido and Batt Tamietti and defines nominal damages and restricts the jury to awarding the parties nominal damages only.

The fourth is on the proposition that the evidence fails to disclose that the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, and that they must therefore find for the defendant.

The sixth specification is the exceptions to the charge of the court and covers the ground set forth in specification 3.

In view of the contentions already advanced in this brief, we deem it unnecessary to discuss these alleged errors at length, and we trust the court will dispose of this controversy without being called upon to consider these errors. However, should the court be inclined to deem it necessary to consider them, then we say that under the law of the case as laid down by the court and to which reference is made in the statement, supra, the plaintiffs have failed to prove a case to sustain the judgment rendered in their favor.

The court's instruction in this regard may be illuminated by a reference to what this court said in the Kjelsberg case:

> "Error is assigned to the instructions to the jury in which they were told in substance that the rule of law is that where the lessor has title, and for any reason refuses to lease the premises agreed upon, he shall respond in damages and make good to the lessee whatever he may have lost by reason of his bargain, and that the

lessee would be entitled to such profits as would have been derived from the premises, for the full period of the term for which the lease was to be made, and that proof of the profits may be made by showing what profits were made under a like lease of the same property to other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in thesame manner as the persons did who worked the same. We find no error in the instructions so given. In the case of a wrongful breach of a contract to lease houses or land, the measure of damage to the plaintiff is easy of ascertainment. It is the reasonable value of his contract, and not the profits which he would have made if the agreement had been carried out. It is well settled that where one contracts to grant a lease, well knowing that he has not title or where he puts it out of his power to grant the lease by giving a lease to a third person, the other party to the contract may recover as damages the value of his bargain. Robinson v. Harman, 1 Exh. 850; Ford v. Tiley, 6 B. & C. 325. And other damages, which are the direct and natural consequences of the breach, may be recovered in addition to the value of the bargain. Driggs v. Dwight, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; Wolf v. Studebaker, 65 Pa. 459; Hall v. Horton, 79 Iowa, 352, 44 N. W. 569; Hanslip v. Padwick, 5 Exch. 615.

More analagous to the case at bar, however, are the cases of croppers' leases, where land is let or agreed to be let to be formed on shares. In such cases the profits which the lessee might have made are often taken into consideration in determining the measure of his damages for a breach of the contract. Depew v. Ketchum,

75 Hun. 277, 28 N. Y. Supp. 8; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Bowers v. Graves & Vinton Co., 8 S. D. 385, 66 N. W. 931; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 4 Am. St. Rep. 479. In Depew v. Ketchum it was held that the measure of the lessee's damages was the value of his term surrendered, based upon the capacity of the farm to yield a profit to one working under the contract. In Taylor v. Bradley, the court said:

'To my mind the only rule which can be prescribed and the only rule which will do justice to the parties, is that the plaintiff is entitled to the value of his contract. He was entitled to its performance. It is broken. He was entitled to is deprived of his adventure. What was this opportunity, which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit.'

Kjelsberg v. Chilberg, 177 Federal, pp. 109-112.

As pointed out in the statement, two of the plaintiffs, Frank Tamietti and John Pagleero, mined all of the ores remaining in the disputed territory after the 16th day of January, 1922, the day upon which the alleged contract was terminated, and removed therefrom three cars of commercial ore, and the court by its instructions limited the right of Gaido and Tamietti to recover one-fifth (1/5) interest each in the net profits, if any, derived from those three cars that would accrue to them after deducting all

expenses incident to mining same, and that the burden rested upon the plaintiffs that they could and would have mined that ore not at a loss but at a profit to themselves, after deducting the cost of mining (Tr. 196-197).

Now, a reference to plaintiffs' exhibit Q (Tr. 158-163) discloses that the miners who did mine the three cars received as their gross shares on the first car $988.00 (Tr. 159); on the second car $1986.05 (Tr. 161); on the third car $1,006.74; totaling $2,980.79.

An inspection of exhibit Q discloses that the miners did not receive all of the above sum because deductions were made which we will not here attempt to compute, yet they amounted in all to more than two hundred ($200.00) dollars; but, eliminating the deductions from consideration, the one-fifth part of the gross share of the miners is $596.16. Under the court's instructions, Gaido and Tamietti would be entitled to no more than $596.16 each, had the contract not been cancelled, but the instructions go furthere and inform the jury that Tamietti and Gaido if enitled to recover, at all, would be entitled to recover only on the net profits after deducting the cost of mining.

The record is silent as to the length of time required to mine these three cars. The record is silent as to whether Gaido and Batt Tamietti could and would have mined the same practically in the same manner as the persons did who worked the same,

which is one of the tests laid down by this court in the Kjelsbuerg case.

Gadio testified that in his opinion it would take about thirty (30) days to have stoped out the ore left in the in the hanging wall of the lead, and about forty or forty-five days to take out the ore from the foot wall lead, with six men working (Tr. 126).

Now the law is that to reap any benefit the plaintiffs must have submitted to labor. Their net profits would be the difference between two-fifths of the gross yield and two-fifths of the cost of the work and labor necessary to mine the ore, and the cost of work and labor would be the established scale of miners' wages.

There is nothing in the record to indicate that these parties could have earned miners' wages in mining the ore had they been permitted to do so.

There is nothing in the record to show whether or not these parties worked elsewhere during that period and earned miners' wages. If they did they were not damaged at all, unless for the difference between the goings miners, wages during the period required to mine the ore and the gross returns to the miners who mined the same; hence, the verdict was based purely upon speculation and conjecture, for it is only for such profits that the plaintiffs were entitled to recover, if at all, under the instructions of the court (Tr. 197-198).

In a case where the facts were essentially simi-

lar to the facts in the case at bar, plaintiffs had judgment in the trial court, but the Supreme Court of Colorado in reversing the judgment made the following pertinent observation:

> "The jury returned a verdict for $5,000 in favor of plaintiffs. It might just as well have been $250,000. There is no evidence at all upon which the verdict can rest. It is purely speculative. The estimate of plaintiffs' witnesses as to quantity and value, as well as the verdict of the jury is conjectural—the result of guesswork. A judgment based on such a foundation cannot stand."
>
> Smuggler-Union Mining Co. v. Kent, 122 Pac. 223-228.

When in this case the jury awarded Batt Tamietti and Pete Gaido $770.66 each (Tr. 41-42) and judgment was rendered thereon in their favor, it is quite manifest that the verdict was conjectural and the result of mere guesswork, without any vidence whatsoever to support it.

The laws of Montana wisely provide:

> "8668. Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."
>
> Sec. 8668, Revised Codes of Montana, 1921.
> See also Central Coal & Coke v. Harrman, 111 Federal Reporter, 96-103;
> Rass v. Sharp, 46 Mont., 474-477;
> Wigmore on Evidence, Sec. 447;
> California Press Mfg. Co. v. Stafford, 221 Pac. 345-347 (Cal.);

McCornick, et al. v. United States Mining Co., 185 Federal Reporter, 748.

The defendants in error have had their day in court, and we must assume that they made out as good a case as it was possible for them to make. It appears from the record that there was a former trial of this case, hence the defendants in error have twice had their day in court, and under the circumstances we respectfully submit that the judgment of the learned trial court should be reversed, with instructions to dismiss.

Respectfully submitted,

WALKER & WALKER and C. S. WAGNER,

409 Silver Bow Block, Butte, Montana.

Attorneys for Plaintiffs in Error,